Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1315

JAMES F. LAWRENCE, ROBERT G. KNOTT, MARTHA McLANAHAN, ELIZABETH B. PARKINSON and 215 EAST 72nd STREET CORPORATION,

Petitioners,

vs.

JOSEPH B. KLEIN, as Chairman, PHILIP P. AGUSTA, as Vice Chairman, and HARRY M. CARROLL, JOHN J. WALSH, JOHN B. CINCOTTA, as Members of the Board of Standards and Appeals of the City of New York, SAMUEL LINDENBAUM, as Applicant, 72nd STREET ASSOCIATES and DAVID BERG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this proceeding on December 19, 1977. The said judgment denied a motion by petitioners for leave to appeal to the Court of Appeals.

Opinions Below

In denying petitioners' motion for leave to appeal to it the Court of Appeals issued no opinion. A similar motion was denied, without an opinion, by the Appellate Division of the New York State Supreme Court, First Judicial Department (the "Appellate Division") on October 25, 1977.

On September 13, 1977, the Court of Appeals granted a motion by respondents to dismiss the appeal by petitioners to the Court of Appeals taken as of right. It rendered no opinion.

The opinion of the Appellate Division is reported at 58 A.D.2d 751, 396 N.Y.S.2d 223 (1st Dept. 1977) (A. 1-3)[1] The opinion of the Supreme Court of the State of New York, New York County (A. 4-9) is unreported.

Jurisdiction

The judgment of the New York Court of Appeals was entered on December 19, 1977. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. Does the due process clause of the Fourteenth Amendment govern the procedure by which an application for a zoning variance is determined, under a zoning resolution such as that of the City of New York?

2. What kind of hearing is required for the making of the findings of fact mandated by § 72-21 of the Zoning Resolution of the City of New York?

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[1] References to the Appendix are indicated as A.—.

Constitutional Provision and Statutes Involved

United States Constitution

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." United States Constitution, Amendment XIV, § 1.

Article 78 of the New York Civil Practice Law and Rules (McKinney 1963)

"§ 7801. Nature of proceeding.

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. . . . [at 16].

§ 7804. Procedure.

• • •

(d) Pleadings. There shall be a verified petition, which may be accompanied by affidavits or other written proof. Where there is an adverse party there shall be a verified answer, which must state pertinent and material facts showing the grounds of the respondent's action complained of. There shall be a reply to a counterclaim denominated as such and there shall be a reply to new matter in the answer or where the accuracy of proceedings annexed to the answer is disputed. The court may permit such other pleadings as are authorized in an action upon such terms as it may specify.

(e) Answering affidavits; record to be filed; default. The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court. . . ." [at 178-79.]

Zoning Resolution of the City of New York (Vol. I)

"72-21

Findings Required for Variances

When in the course of enforcement of this resolution, any officer from whom an appeal may be taken under the provisions of Section 72-11 (General Provisions) has applied or interpreted a provision of this resolution, and there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such provision, the Board may, in accordance with the requirements set forth in this Section, vary or modify the provision so that the spirit of the law shall be observed, public safety secured, and substantial justice done.

Where it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application of the provisions of this resolution in the specific case, provided that as a condition to the grant of any such variance, the Board shall make each and every one of the following findings:

(a) That there are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular *zoning lot;* and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the *use* or *bulk* provisions of the resolution; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances

created generally by the strict application of such provisions in the neighborhood or district in which the *zoning lot* is located.

(b) That because of such physical conditions there is no reasonable possibility that the *development* of the *zoning lot* in strict conformity with the provisions of this resolution will bring a reasonable return, and that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return from such *zoning lot.* This finding shall not be required for the granting of a variance to a non-profit organization.

(c) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the *zoning lot* is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

(d) That the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner or by a predecessor in title. Where all other required findings are made, the purchase of a *zoning lot* subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.

(e) That within the intent and purposes of this resolution the variance, if granted, is the minimum variance necessary to afford relief; and to this end, the Board may permit a lesser variance than that applied for.

It shall be a further requirement that the decision or determination of the Board shall set forth each required finding in each specific grant of a variance, and in each denial thereof which of the required findings have not been satisfied. In any such case, each finding shall be

supported by substantial evidence or other data considered by the Board in reaching its decision, including the personal knowledge of or inspection by the members of the Board. Reports of other City agencies made as a result of inquiry by the Board shall not be considered hearsay, but may be considered by the Board as if the data therein contained were secured by personal inspection." [at 292-93.]

Statement of the Case

Each of the individual petitioners owns and resides in a cooperative apartment in the building owned by petitioner 215 East 72nd Street Corporation ("215 Corp."), in the Borough of Manhattan, City and State of New York. The building is on the northern side of East 72nd Street, across East 72nd Street from a parcel of real property owned by respondent 72nd Street Associates ("Associates"), a partnership of which respondent David Berg is one of the partners. The parcel is bounded on the west by the entire blockfront, on the eastern side of Third Avenue, from East 72nd Street to East 71st Street, and on the south by the northern side of East 71st Street.

Respondents Joseph B. Klein, as Chairman, Philip P. Agusta, as Vice Chairman, and Harry M. Carroll, John J. Walsh and John B. Cincotta, comprised the Board of Standards and Appeals of the City of New York (the "Board").

On March 18, 1976, respondent Samuel Lindenbaum, who was actually the attorney for respondents Associates and Berg, applied to the Board for substantial variances[2] from

[2] The variances sought were: (1) a variance allowing the building to be constructed with a greater ratio of total floor space to lot area than permitted by the zoning resolution; (2) a variance from the zoning requirement that the building be set back

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the Zoning Resolution of the City of New York (the "Zoning Resolution"), in connection with the proposed construction of a 35 story residential apartment building on its parcel. Petitioners and a large number of other nearby residents opposed the application, at a "kind of hearing'" held by the Board.

The grant of variances by the Board is authorized and governed by § 72-21 of the Zoning Resolution. Variances may be granted if "it is alleged that there are practical difficulties or unnecessary hardship." The section mandates "that as a condition to the grant of any such variance, the Board shall make each and every one of the . . . findings . . ." set forth in the section.

From the very outset of the Board proceeding, petitioners objected to the procedures of the Board as violative of the mandates of the due process clause of the Fourteenth Amendment, with respect to the "individualized fact finding" (*Gonzalez* v. *United States,* 348 U.S. 407, 412 (1955)) required by the Zoning Resolution. Some of those procedures are set forth in the Board's Rules of Procedure (the "Board Rules"). The remainder appear to be based simply upon the unwritten and self-serving traditions of the small and select group of attorneys, architects and engineers who dominate most of the important business before the Board.

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from the lot line; (3) a variance allowing the builders to exceed by more than half the density limits of the zoning resolution as to the number of zoning rooms; (4) a variance permitting a reduction in the mandated number of off-street parking spaces; and (5) a variance waiving the provision of the zoning resolution which requires a specified minimum amount of space between buildings located on the same zoning lot.

[3] *See Wolff* v. *McDonnell,* 418 U.S. 539, 557 (1974); Friendly, *Some Kind of Hearing,* 123 U.Pa.L.Rev. 1267 (1975) [hereinafter *"Friendly"*].

These written and unwritten rules barred any cross-examination, sanctioned the proof of critical adjudicative facts[4] by unsworn statements, documents and letters, condoned the practice of having the same persons to perform the functions of attorney, principal and witness, and otherwise rendered it impossible for petitioners to participate meaningfully in the Board's fact finding process. All of petitioners' objections were overruled.

On July 13, 1976, a kind of hearing was held. On September 14, 1976, the Board granted each and every one of the variances sought. In so doing it did not make the specific findings required for variances by the Zoning Resolution. The Board instead simply, "RESOLVED, that [it] does hereby make each and every one of the required findings . . . and that the application be and it hereby is granted under § 72-21 of the Zoning Resolution . . . ."

Pursuant to Article 78[5] of the New York State Civil Practice Law and Rules ("CPLR"), petitioners, on October 14, 1976, petitioned the New York State Supreme Court, New York County, for review of the Board's action authorized by that Article. On or about January 20, 1977, the Board filed its Answer to the petition and on or about January 21, 1977, respondents Lindenbaum, Associates and

[4] The term "adjudicative facts," as used in this petition, means, as defined by Davis in his treatise on administrative law, the "facts about the parties and their activities, businesses and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case." K. Davis, *Administrative Law Text* § 7.03 (1972); *see also Marshall* v. *Sawyer*, 365 F.2d 105 (9th Cir. 1966); *Wood County Bank* v. *Camp*, 348 F.Supp. 1321 (D.D.C. 1972).

[5] Article 78 provides for the "[r]elief previously obtained by certiorari to review, mandamus or prohibition . . . ." For a statement of the history and function of Article 78, *see* 8 Weinstein, Korn and Miller, *N.Y. Civil Practice* § 7801.01 *et seq.* (1977).

Berg filed their Answer. Each of the answers set forth "A Complete Affirmative Defense." Paragraph "28." of the Board's Answer alleged:

> "28. In granting the application for the variance pursuant to Section 72-21 of the Zoning Resolution, subject to the c[illegible]ions set forth in its resolution, *the Board,* on the [illegible]f evidence in the record, an inspection of the subje[illegible]perty by a committee of the Board, and by reason of the expert knowledge of the Board, *made the following findings*" (emphasis supplied).[6]

Following the paragraph quoted above, the Board's Answer set forth nineteen subparagraphs of detailed "findings," including each of the specific findings required by the Zoning Resolution for the grant of the variances. The Board never made the "findings" set forth in its Answer. No such "findings" appeared in the "certified transcript of the record of the proceedings" (CPLR § 7804(e)) filed by the Board. The only sense in which it might be claimed that the Board made the said "findings," albeit six months after its decision, is that the Chairman of the Board, respondent Klein, verified the Answer on January 18, 1977.

On February 3, 1977, the New York State Supreme Court dismissed the Article 78 petition. In doing so it rejected petitioners' constitutional due process arguments, as well as arguments by petitioners based upon violations by the

[6] The answer by Lindenbaum, *et al.*, alleged that: "22. The Board's decision granting the variances was reasonable, prudent and within the sound exercise of the Board's discretion. The resolution of the Board and its findings of fact, set forth *in its verified answer and return to the petition, are fully supported by the evidence of record . . .*" (emphasis supplied). The said answer thereafter set forth thirteen paragraphs and numerous sub-paragraphs of such "evidence", covering substantially the same matters as the Board's "findings" in its Answer.

Board of its own Rules.[7] Petitioners appealed to the New York State Supreme Court, Appellate Division, First Department, arguing again their constitutional claims. The Appellate Division affirmed the lower court decision, but in doing so stated that:

> "We are perturbed by the point well presented by the appellant that the Board in granting the application for variances, did not make specific findings, but merely noted that required findings had been made. It was not until the answer and return in this Article 78 proceeding that the facts found, which lead to its conclusions were disclosed. Further, the Zoning Resolution of the City of New York, § 72-21, requires these findings. Whether this accords with procedural due process, *cf. Goldberg* v. *Kelly*, 397 U.S. 254, is a question properly raised." (A. 3).

Petitioners appealed to the New York State Court of Appeals under CPLR § 5601(b), permitting an appeal to it as of right,

> "1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States;"

Respondents Lindenbaum, *et al.*, thereafter moved to dismiss the appeal to the Court of Appeals on the ground that no substantial constitutional question was directly involved. The Court of Appeals granted the said motion by order dated September 13, 1977. Both the Appellate Division and the Court of Appeals thereafter denied, by

[7] In doing so the Court misstated the thrust of petitioners' constitutional arguments, referring "to the contentions of the petitioners that the Board did not follow its own procedural rules and *thus* deprived petitioners of their constitutional rights . . ." (emphasis supplied) (A. 8).

orders dated October 25, 1977 and December 19, 1977, respectively, a motion by petitioners for leave to appeal to the Court of Appeals, made under CPLR § 5602, providing for appeals to the Court of Appeals by permission.

Reasons for Granting the Writ

I. This Case Involves Important Constitutional Issues Upon Which This Court Has Not Yet Passed.

Circuit Judge Henry J. Friendly has stated that:

> "Since then [*Goldberg* v. *Kelly*, 397 U.S. 254 (1970)], we have witnessed a due process explosion in which the [Supreme] Court has carried the hearing requirement from one new area of government action to another, an explosion which gives rise to many questions of major importance to our society." *Friendly* at 1268.

Judge Friendly discussed *Goldberg* and its "considerable progeny" (*id.* at 1273), pointing out "some turning back" (*id.* at 1274) from hearing requirements in the 1973 term of the Court and "a resumption of the trend toward greater and greater insistence on hearings" (*id.* at 1274), in the 1974 term.[8]

[8] Prior to Judge Friendly's article, the "due process explosion" had reached the following areas: medical examiners' hearings, *Withrow* v. *Larkin*, 421 U.S. 35 (1975); suspension of public high school students, *Goss* v. *Lopez*, 419 U.S. 565 (1975); Interstate Commerce Commission certification "of public convenience and necessity hearings," *Bowman Transportation, Inc.* v. *Arkansas—Best Freight System, Inc.*, 419 U.S. 281 (1974); dismissal hearings for nonprobationary federal employees, *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); Food and Drug Administration decision to withdraw "new drug applications," *Weinberger* v. *Hymson Wescott & Dunning, Inc.*, 412 U.S. 609 (1973); probation revocation proceedings, *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973); state

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The "due process explosion" has not yet reached zoning or related land use proceedings. Beginning with *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), this Court has decided 13 zoning cases,[9] all of which have involved *substantive* rights.

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optometry board hearings, *Gibson* v. *Berryhill*, 411 U.S. 564 (1973); dismissals of teachers at public institutions, *Perry* v. *Sindermann*, 408 U.S. 593 (1972) and *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); parole revocation proceedings, *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); procedures for the repossession of chattels, *Fuentes* v. *Shevin*, 407 U.S. 67 (1973); proceedings for termination of social security disability payments, *Richardson* v. *Wright*, 405 U.S. 208 (1972); proceedings for the termination of governmental employees, *Connell* v. *Higgenbotham*, 403 U.S. 207 (1971); suspension of driver's license hearings, *Bell* v. *Burson*, 402 U.S. 535 (1971); posting of names of individuals deemed unfit to consume alcoholic beverages, *Wisconsin* v. *Constantineau*, 400 U.S. 422 (1971); mail violation hearings, *Rowan* v. *United States Post Office Department*, 397 U.S. 728 (1970); termination procedures for old age benefits, *Wheeler* v. *Montgomery*, 397 U.S. 280 (1970); termination procedures for public assistance, *Goldberg* v. *Kelly*, *supra*, and; state commission hearings relating to criminal violations of labor-management relation laws, *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969).

Since then this Court has ruled upon the hearing requirements of procedural due process in these areas: dismissal of students for unsatisfactory academic performance, *Board of Curators* v. *Horowitz*, 46 U.S.L.W. 4179 (February 28, 1978); procedures for removal of foster children from their foster homes, *Smith* v. *Organization of Foster Families for Equality and Reform*, 97 S.Ct. 2094 (1977); imposition of corporal punishment in public schools, *Ingraham* v. *Wright*, 97 S.Ct. 1401 (1977); transfer of prison inmates, *Montanye* v. *Haynes*, 96 S.Ct. 2543 (1976) and *Meachum* v. *Fano*, 96 S.Ct. 2532 (1976); termination of employment of a city policeman, *Bishop* v. *Wood*, 96 S.Ct. 2074 (1976); defamation of reputation, *Paul* v. *Davis*, 96 S.Ct. 1155 (1976), and; the termination of social security disability benefits, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

[9] *Village of Euclid* v. *Ambler Realty Co.*, *supra* [comprehensive zoning ordinance held constitutional]; *Zahn* v. *Board of Public Works*, 274 U.S. 325 (1927) [zoning ordinance not unconstitutional as applied]; *Gorieb* v. *Fox*, 274 U.S. 603 (1927) [set-back provision in zoning ordinance held constitutional]; *Nectrow* v. *City*

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This case poses important questions of the applicability of procedural due process requirements, particularly of *Goldberg* and its progeny, to the quasi-adjudicative aspect[10] of zoning law and practice, the actions of zoning boards of appeals on applications for variances.[11]

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of Cambridge, 277 U.S. 183 (1928) [restrictions in zoning regulations must bear a substantial relation to the public health, safety, morals, or general welfare]; *State of Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928) [city ordinance permitting construction of philanthropic institutions in zoning district only on written consent of nearby landowners held unconstitutional]; *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962) [ordinance regulating dredging and pit excavation held valid exercise of police power]; *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974) [zoning ordinance limiting occupancy of one-family dwellings to traditional families or to groups of not more than two unrelated persons held constitutional]; *Warth* v. *Seldin*, 422 U.S. 490 (1975) [petitioners, residents of Rochester, New York, held not to have standing to challenge the allegedly unconstitutional zoning practices of a nearby suburb]; *Hills* v. *Gautreaux*, 425 U.S. 284 (1976) ["comprehensive metropolitan plan" to desegregate Chicago's public housing held constitutional]; *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) [requirement of approval by 55% of voters in referendum before institution of land use changes held constitutional]; *Young* v. *American Mini Theaters, Inc.*, 427 U.S. 50 (1976) [city zoning ordinance restricting location of adult movie theaters and book stores held not to violate due process, equal protection or freedom of speech]; *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977) [decision of petitioner Village to deny rezoning application held not violative of equal protection clause]; *Moore* v. *City of East Cleveland*, 97 S. Ct. 1932 (1977) [ordinance making it a crime for son and grandsons living with homeowner held unconstitutional].

[10] *See* ALI Model Land Development Code, Art. 2 (1976); 3 R. Anderson, *American Law of Zoning* § 16.01 (1968) [hereinafter *Anderson*]; 1 P. Rohan, *Zoning and Land Use Controls* § 1.02[5] *et seq.* (1977) [hereinafter *Rohan*]; 5 N. Williams, *American Land Law Planning* 2-3 (1975) [hereinafter *Williams*].

[11] A variance has been defined in 2 *Anderson* at § 14.02 as:

"... an authorization for the construction or maintenance of a building or structure, or for the establishment or main-

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Variance provisions are found in virtually all zoning ordinances. This is in part owed to the fact that the enabling acts in all fifty states were originally based, and in 47 states are still based, on the Standard State Zoning Enabling Act ("SEZA") prepared by the U.S. Department of Commerce in 1922. 2 *Williams* at 355. It authorized variances "from the terms of the ordinance where literal enforcement would result in unnecessary hardship." ALI Model Land Development Code, Commentary at 1-2 (1976).

A provision for variances is necessary to prevent the ordinance being deemed void and unconstitutional in its application to particular property, if such application results in unique hardship, rendering it arbitrary, oppressive or confiscatory.[12] The quasi-judicial action of a board of zoning appeals, in acting upon a variance application, is to be distinguished from the legislative or quasi-legislative action of adoption or amendment of the zoning ordinance.[13] Somewhere between the two is the action involved in the rezoning of a specific piece of land.[14]

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tenance of a use of land, which is prohibited by a zoning ordinance. It is a right granted by a board of adjustment pursuant to power vested in such administrative body by statute or ordinance, and is a form of administrative relief from the literal import and strict application of zoning regulations." (footnotes omitted).

For a discussion of "variances" in the slightly different context of the Clean Air Act Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676; *see Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975).

[12] *See Chicago* v. *Sachs*, 1 Ill.2d 342, 115 N.E.2d 762 (1953); *Schaible* v. *Board of Adjustment*, 134 N.J.L. 473, 49 A.2d 50 (1946).

[13] *Rubin* v. *Board of Directors*, 16 Cal.2d 119, 124, 104 P.2d 1041, 1043 (1940); *see also Rohan* § 1.02[5] *et seq.*; 5 *Williams* at 1-3.

[14] *Compare South Gwinnet Venture* v. *Pruitt*, 491 F.2d 5 (5th Cir.), *cert. denied*, 419 U.S. 837 (1974), *reversing en banc*, 482 F.

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In order to discharge its quasi-adjudicatory function, it is almost universally required that a zoning board of appeals make specific findings and base its decision on such findings.[15] The duty to make the specific findings "is not met by parroting the highly generalized statutory phrases . . . ." *Lindburg* v. *Zoning Board of Appeals*, 8 Ill.2d 254, 133 N.E.2d 266 (1956).[16]

Section 72-21 of the Zoning Resolution is in all respects typical in its requirement of specific findings. Violations by the Board of its duty to make findings as the basis of its decision, and substitution of *post-hoc* rationalization if and when the decision is reviewed by court litigation, have been adjudged unlawful. *Application of New York City Housing & Redevelopment Authority* v. *Foley*, 23 A.D.2d 84, 258 N.Y.S.2d 526 (1st Dept. 1965). Inexplicably, New York State courts countenance the violation by stating that remand to the Board is pointless. *Id.* at 87, 258 N.Y.S.2d at 529. Courts of other states have ruled differently.[17]

The practices of zoning boards of appeals under thousands of zoning ordinances, virtually all of which vest the

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2d 389 (5th Cir. 1973), *with Chrobuck* v. *Snohomisa County*, 78 Wash. 2d 858, 480 P.2d 489 (1971) and *Ward* v. *Village of Skokie*, 26 Ill.2d 415, 186 N.E.2d 529 (1962). *See also* ALI Model Land Development Code, Note to § 2-312 (1976).

In *Montgomery County* v. *Woodward & Lothrop, Inc.*, 280 Md. 686, 376 A.2d 483 (1977), *cert. denied sub nom., Funger* v. *Montgomery County*, 46 U.S.L.W. 3526 (February 21, 1978), the administrative body was not acting in a quasi-judicial capacity.

[15] *See, e.g., Clark Heating Oils, Inc.* v. *Zoning Board of Appeals*, 159 Conn. 234, 268 A.2d 381 (1970); *Baker* v. *Zoning Board of Review*, 102 R.I. 134, 228 A.2d 859 (1967); *Collins* v. *Behan*, 285 N.Y. 187, 33 N.E.2d 86 (1941); *see also* 3 *Anderson* § 20.41.

[16] *See also* 3 *Anderson* § 20.41; 8 E. McQuillon, *The Law of Municipal Corporations* § 25.272 (3rd ed. 1976); 2 E. Yorkley, *Zoning Law and Practice* § 15-17 (Cum.Supp. 1976).

[17] *See Lindburg* v. *Zoning Board of Appeals, supra; see also Badanek* v. *Schroskey*, 21 Mich. App. 582, 175 N.W.2d 784 (1970).

power to grant variances in zoning boards of appeals, the tens of thousands of variance applications each year, the millions of people whose interests are significantly affected by such applications, and the hundreds of millions of dollars of property values probably affected thereby,[18] have prompted a number of studies and criticisms of the variance process. One of the more authoritative studies states that:

> "Few legal institutions have been more consistently and vigorously criticized than zoning boards of adjustment, whose major function is to consider applications for variances. Commentators, while not denying that variances are a necessary 'flexibility device,' assert that the boards grant relief too freely, flouting the law by following their own permissive inclinations rather than the stricter standards laid down by the courts." (footnotes omitted)[19]

One of the means by which zoning boards of appeals follow "their own permissive inclinations rather than the

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[18] *See* A. Manuel, *Local Land and Building Regulation* (National Commission on Urban Problems 1968). In addition to the municipal zoning boards of appeals ruling upon variances, there are numerous county, regional, state and interstate agencies now exercising zoning powers and necessarily acting upon variance or analogous applications. *See* Bosselman and Callies, *The Quiet Revolution in Land Use Control, A Report to the Council on Environmental Quality* (1971); 5 *Williams* § 160 *et seq.;* Sullivan, *Araby Revisited: The Evolving Concept of Procedural Due Process Before Land Use Regulatory Bodies,* 15 Santa Clara L. 50 (1974) [hereinafter *Sullivan*].

[19] Bryden, *The Impact of Variances: A Study of Statewide Zoning,* 61 Minn. L. Rev. 769 (1977) [hereinafter *Bryden*]; *see also* Booth, *A Realistic Reexamination of Rezoning Procedure: The Complementary Requirement of Due Process and Judicial Review,* 10 Ga. L. Rev. 753 (1976); *Sullivan.*

In addition to the criticisms cited by Professor Bryden, *see* J. Makielski, Jr., *The Politics of Zoning: The New York Experience* (1966); Makielski, *Zoning: Legal Theory and Political Practice,* 45 J. of Urban L. 1 (1967).

stricter standards laid down by the courts," *Bryden* at 7, "is by parroting the highly generalized statutory phrases . . .," *Lindburg* v. *Zoning Board of Appeals, supra,* in lieu of making the detailed findings required by law. The Board's practice in doing so was specifically addressed in a study by the Citizens Union Research Foundation, Inc. of the City of New York, published in 1977.[20] The study presented "a detailed analysis of 168 cases in the Boroughs of Manhattan and Brooklyn that were before the Board in 1971, 1972, 1973 and 1974." (*Id.* at 9). Part of its "SUMMARY OF FINDINGS" follows:

> "Although Section 72-21 of the Zoning Resolution requires the Board to set forth each of Five Findings supported by substantial evidence before it can grant a variance, in practice these findings have often served little more than a ceremonial function.'"[21]

A second means by which zoning boards, particularly the Board herein, follow "their own permissive inclinations," is by relying upon inspection of the property and their own presumed expertise, but nowhere indicating to the parties or to a reviewing court the facts thereby learned and presumably relied upon as evidence. The

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[20] S. Haycock, *The Board of Standards and Appeals: An Analysis Of The Decision Making Process* (1977) [hereinafter the "Citizens Union Study"].

[21] In addition to the statement in the SUMMARY OF FINDINGS, the following comment appears at pages 21 and 22:

> "No case by case evolution of standards for variances has been possible as Board rulings generally contain only the formal orders of the Board. There is no oral or written opinion of the Board telling interested persons why a decision was made. The Board simply states that:
>
> Whereas, the premises and surrounding area were inspected by a Committee of the Board; and
>
> Whereas, the Board has determined that the evidence in the record supports the findings required to be made under Section 72-21 of the Zoning Resolution, and that the applicant is therefore entitled to relief on the grounds of practical difficulty and/or unnecessary hardship." (footnote omitted).

problem is the same as that posed by this Court, per Cardozo, J., in *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 303 (1937):

> "To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?"

In this case the Board indulged in its ritualistic obfuscation. The introductory sub-paragraph of paragraph "28" of its Answer, following which are the ten pages of the detailed *post-hoc* "findings," states:

> "In granting the application for the variance pursuant to Section 72-21 of the Zoning Resolution, subject to the conditions set forth in its resolution, the Board, on the basis of evidence in the record, an inspection of the subject property by a committee of the Board, and by reason of the expert knowledge of the Board, made the following findings:"

To the practices described above, may be added: the prohibition of cross-examination, the frequent use of and reliance upon unverified "evidence," the denial of any right of subpoena, the absence of any discovery, and the dual or treble capacities in the proceeding of those seeking the variance.[22] The proceedings are also frequently con-

[22] In this case Mr. Lindenbaum was the "Applicant" and also the attorney for respondent Associates, the owner of the property. Respondent Berg was a partner. A principal aspect of the Application to the Board was a 17 page, single space letter, entitled "STATEMENT OF FACTS," signed "Samuel H. Lindenbaum of Rosenman Colin, et al., Applicant." The letter is under the letterhead of "Rosenman Colin Freund Lewis & Cohen." Berg, an attorney and also a real estate developer, interposed affidavits before the Board, furnishing thereby both lay and expert testimony. He also was of counsel on court papers in the litigation.

ducted in an atmosphere of hostility to any persons and interests outside of the zoning establishment comprised of the boards themselves and the generally small number of specialists representing the applicants for the variances.[23]

While no single one of the practices may render the process unconstitutional, the aggregate of the practices denies non-zoning establishment outsiders a fair hearing. Petitioners submit that the time has come for this Court to consider the ventilation of zoning boards' cloistered chambers with the fresh air of post-*Goldberg* procedural due process.

II. The Board Violated Procedural Due Process.

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer, supra,* at 481. As Justice Frankfurter stated in his concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 162 (1951), quoted in *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895 (1961),

> "unlike some legal rules [procedural due process] is not a technical conception with a fixed content unrelated to time, place and circumstances."

[23] The Citizens Union Study found that the Board granted the variances in 133, or 79.2% of the 168 cases, and denied the variances in 13, or 7.7% of the cases (*id.* at 25). In 121 cases or 72%, there were intervenors; in 44 cases the interventions were consents only, in 39 cases there were objectors only, and in 38 cases there were both consentors and objectors. (*Id.* at 25). In only 8 cases were lawyers retained by intervenors. The Study analyzed the representation of applicants by three particular attorneys, including Samuel Lindenbaum, Esq., the applicant before the Board in this case, stating:

> "Samuel Lindenbaum was involved only in Manhattan cases, 89% of the time as a representative of a professional developer. He was the attorney in 76% of the cases involving buildings of more than 16 stories. In Brooklyn, Leonard Rothkrug was the most frequent representative; 60% of all of his cases were businessmen. It is worth noting that seldom did either of these attorneys lose a case." (*Id.* at 13).

If there ever was, there is no longer, any formula under which the name given to a proceeding, e.g. "legislative" or "adjudicatory," or to the facts at issue in the proceeding, determines whether a "trial-type hearing," with all of its incidents, is required.[24] What does determine the kind of hearing[25] due process requires is a sophisticated analysis of the nature of the proceeding, particularly of the facts at issue. Based upon such analysis, what is a fair hearing "at a meaningful time and in a meaningful manner" can be ascertained. *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). An important aspect of that analysis is consideration of the "three distinct factors" set out in *Mathews* v. *Eldridge, supra,* at 334-35:

> "[F]irst, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

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[24] *Friendly* at 1268.

Professor Davis, analyzing *Mathews* v. *Eldridge, supra,* and *Goss* v. *Lopez, supra,* describes the requirement of the particularized analysis as follows:

> "A main idea of the old law was that each agency for each function had to make a choice between trial procedure and no trial procedure, and courts would approve or disapprove each such choice. *The main idea of the new law, represented by Eldridge and Goss, is that each agency for each function must work out procedure that will be both efficient and fair—procedure that may include some of the elements of a trial and not others.*" (emphasis added). K. Davis, *Administrative Law of the Seventies* § 7.00-1-2 (Supp. 1977).

[25] There is no question in this case of the applicability of procedural due process, requiring *some* kind of hearing. *But see Board of Curators* v. *Horowitz, supra; Paul* v. *Davis, supra.*

As to the first *Mathews* factor, all of the petitioners have invested tens of thousands of dollars in the real property owned by them. No persons exist who could have more substantial "private interest[s] that will be affected[26] [adversely] by the official action" of the Board, increasing by millions the value of Associates' property.

The second *Mathews* factor requires examination into the nature of the facts at issue. Clearly, most of the facts necessary for the Board to find in order to grant a variance, specified in § 72-21 of the Zoning Resolution, were "individualized" or "adjudicative" facts. The "unique physical conditions" of the particular property, the "practical difficulties or unnecessary hardship . . . in complying strictly . . ." with the Resolution, whether or not the variance is "necessary to enable the owner to realize a reasonable return . . ." and whether or not the difficulty has been created by the Applicant himself, the facts put in issue by § 72-21, are "about the parties and their activities, businesses, and properties . . . ." Davis, *The Requirement Of A Trial-type Hearing,* 70 Harv.L. Rev. 193, 199 (1956).

The adjudicative nature of the facts relates directly to both "the probative value . . . of [the] additional or substitute safeguards . . ." sought by petitioners and denied by the Board, and "the risk of erroneous deprivation . . . through the procedures used." The "safeguards" sought by petitioners, several of which are among Judge Friendly's "Elements of A Fair Hearing," are discussed below, *seriatim.*

One safeguard was the requirement that the facts be found and that the decision *then* be made. In reversing the order of things, the Board denied Element "9" of Judge

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[26] *See* Marshaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews* v. *Eldridge: Three Factors in Search of a Theory of Value,* 44 U. Chi. L. Rev. 28, 46-54 (1976).

Friendly's fair hearing elements, "a Statement of Reasons." *Friendly* at 1291.

A second "additional safeguard" was some right of cross-examination. The Board assumed that it did not have any discretion to consider the matter. This was in conflict with the weight of authority in other states. *See, e.g., Wadell* v. *Board of Zoning Appeals,* 136 Conn. 1, 68 A.2d 152 (1949).[27]

A third "additional safeguard" sought was some right to subpoena witnesses. Judge Friendly's Elements "4" and "5" are "The Rights to Call Witnesses, [and] to Know the Evidence Against One." *Id.* at 1282.

A fourth "additional safeguard" was the demand that whatever facts the Board ascertained from its "inspection of the subject property by a committee of the Board, and by reason of the expert knowledge of the Board" (Board Answer, par. "28"), be identified and set out in its findings. The Board's failure to do so not only violated New York law, *Application of New York City Housing & Redevelopment Authority* v. *Foley, supra,* but denied to petitioners Element "6" of Judge Friendly's elements, "To Have Decision Based Only on the Evidence Presented." *Id.* at 1282.

A fifth "additional safeguard" was a requirement that all of the principal "testimony" be verified. This, together with cross-examination, has been characterized by the Court of Appeals of New York State, in a context other than zoning, as one of "the traditional safeguards to truthfulness developed in our common-law procedure." *Hecht* v. *Monaghan,* 307 N.Y. 461, 121 N.E.2d 421 (1954). Much of the principal "evidence" before the Board, including the financial data underlying the "reasonable return" determination, was unverified and second or third degree hearsay.

[27] *See also* 2 A. Rathkopf, *The Law of Zoning and Planning* ch. 43 § 3 (1972); 1 E. Yorkley, *Zoning Law and Practice* (2d ed. 1953); *Sullivan.*

Clearly, three of Judge Friendly's Elements of a Fair Hearing" were denied petitioners by the Board. Each other "additional safeguard" sought by petitioners was important for their meaningful participation in the Board's individualized fact finding.

The last of the three *Mathews* factors is that of the "fiscal or administrative burden" that may arise out of the imposition of the "additional safeguards." Petitioners are unable to measure those burdens accurately in dollars or man hours. The one factual analysis which they can point to is the Citizens Union Study, which found that in only eight of 168 variance proceedings studied, were intervenors, consenting or opposing, represented by attorneys. It is unclear how many of the eight or fewer attorneys would avail themselves of any of the "additional safeguards" which this Court might direct if it establishes some minimal standards. What is clear is that ***any*** "additional safeguard" may impose some burden upon the offending agency.

Petitioners do not claim that every one of the procedures denied them is indispensable to procedural due process. They do claim that denial of *all* was unconstitutionally impermissible. They submit that this Court, by the grant of this petition, should enable itself to consider whether zoning variance proceedings may continue to enjoy a constitutionally privileged status.

Conclusion

For the reasons set forth herein, a writ of certiorari should be granted and the judgment below should be reversed.

Dated: March 17, 1978.

Respectfully submitted,

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LAURENCE MAY
Of Counsel

APPENDIX A

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 5, 1977.

Present—Hon. Francis T. Murphy, Jr.,
Presiding Justice,
Theodore R. Kupferman,
Herbert B. Evans,
Louis J. Capozzoli,
Justices.

531

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215 East 72nd Street Corporation, James F. Lawrence, Robert G. Knott, Martha McLanahan and Elizabeth Parkinson,

Petitioners-Appellants,

—against—

Joseph B. Klein, as Chairman, Philip P. Agusta, as Vice Chairman, and Harry M. Carroll, John J. Walsh, John B. Cincotta as Members of the Board of Standards and Appeals of New York City, Samuel Lindenbaum, as Applicant, 72nd Street Associates and David Berg,

Respondents-Respondents.

An appeal having been taken to this Court by the petitioners-appellants from a judgment of the Supreme Court, New York County (Helman, J.), entered on February 25, 1977, denying the application and dismissing the petition, and said appeal having been argued by Mr. David Sive

Appendix A.

of counsel for the appellants, and by Mr. Leonard Olarsch, of counsel for the respondent Board of Standards and Appeals, and by Mr. Gilbert S. Edelson, of counsel for the respondents Lindenbaum, 72nd Street and Berg; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

JEROME L. REINSTEIN
Deputy Clerk.

Murphy, P.J., Kupferman, Evans, Capozzoli, JJ.

531 215 East 72nd Street Corporation, et al.,

Petitioners-Appellants,

—against—

Joseph B. Klein, etc., et al.,

Respondents-Respondents.

D. Sive
L. Olarsch
G. S. Edelson

Judgment of the Supreme Court, New York County (Helman, J.) entered February 25, 1977, unanimously affirmed without costs and without disbursements.

Initially, we affirm for the reasons stated at Special Term. As was said in *Matter of Levy* v. *Bd. of Standards*

Appendix A.

& Appeals, 267 N. Y. 347, 351 (Lehman, J.):

> "The Board may act upon its own knowledge of conditions or may make its own survey. 'In that event, however, it must set forth in its return the facts known to its members but not otherwise disclosed.' (*People ex rel. Fordham M. R. Church* v. *Walsh,* 244 N. Y. 280, 287.) The court will not interfere with the exercise of judgment by the Board where the record discloses a basis for the exercise of judgment, but in the return there must be disclosure of facts upon which a reviewing court can determine that, under the statute, the Board had power to grant a variation and that there was scope for the exercise of such judgment."

We are perturbed by the point well presented by the appellant that the Board in granting the application for variances, did not make specific findings, but merely noted that required findings had been made. It was not until the answer and return in this Article 78 proceeding that the facts found, which lead to its conclusions, were disclosed. Further, the Zoning Resolution of the City of New York, § 72-21, requires these findings. Whether this accords with procedural due process, *cf. Goldberg* v. *Kelly,* 397 U. S. 254, is a question properly raised. However, the practice, condoned, if not upheld, by the Court of Appeals has been to allow reliance on findings contained in the return to the petition. *Matter of N. Y. City Housing & Development Bd.* v. *Foley,* 23 A. D. 2d 84, *aff'd without op.,* 16 N. Y. 2d 1071; see *Matter of Elliott* v. *Galvin,* 33 N. Y. 2d 594, 596.

Order filed.

APPENDIX B

Opinion.

SUPREME COURT
NEW YORK COUNTY
Special Term: Part I

In the Matter of the Application of 215 EAST 72nd STREET CORPORATION, JAMES R. LAWRENCE, ROBERT G. KNOTT, MARTHA MCLANAHAN and ELIZABETH B. PARKINSON,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

—against—

JOSEPH B. KLEIN, as Chairman, PHILIP P. AGUSTA, as Vice Chairman, and HARRY M. CARROLL, JOHN J. CINOTTA, as Members of the Board of Standards and Appeals of the City of New York, SAMUEL LINDENBAUM, as Applicant, 72nd STREET ASSOCIATES and DAVID BERG,

Respondents.

HELMAN, J.:

This proceeding is brought pursuant to article 78 of the CPLR for a judgment annulling a determination of the Board of Standards and Appeals of the Board of Standards and Appeals of the City of New York which granted several variances from the strict application of the Zoning Resolution of the City of New York, to the applicant, Samuel Lindenbaum, with relation to the premises located at East 72nd Street and Third Avenue in the City of New

York. The determination of the Board is challenged on the ground that it acted in violation of lawful procedure, disregarded its own Rules of Procedure, acted in an arbitrary and capricious manner and made findings not supported by substantial evidence.

The zoning lot involved in the proceeding occupies the entire blockfront along the east side of Third Avenue, between 71st and 72nd Streets in Manhattan. It is an irregular "L" shaped parcel with a depth of 127 feet east of Third Avenue on 72nd Street and 185 feet along 71st Street. The lot has 4 buildings, 1 occupied by a charitable organization, 2 tenement buildings, and a 1 family building. It has an area of approximately 32,000 square feet and the lot is located in an R10, Ci-5, Ci-9, and R8 zoning district.

In March of 1976 the Borough Superintendent of Manhattan disapproved the application of the owner (Associates) to demolish 2 of the buildings and to construct on about 13,000 square feet of the zoning lot a 35 story building. Generally, the obligations of the Borough Superintendent were concerned with the proposed floor area ratio as related to the maximum specified for that district, the height of the front wall, the number of rooms and the minimum distance between buildings, as well as required parking space.

On March 23, 1976, Associates appealed to the Board pursuant to Section 72-21 of the Zoning Resolution and Section 666 of the City Charter for a variance. In accordance with the Board's Rules of Procedure, the local Community Board was notified of the application. The latter held 2 public hearings at which all residents and property owners who might be affected, were invited. Thereafter, on April 28, 1976 the Community Board voted 29 to 3, to support the application of Associates for a variance.

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On June 22, 1976, a public hearing was held before the Board which was adjourned 3 times for the purpose of affording all interested parties opportunity to present any evidence, testimony or exhibits in opposition to the application. After an inspection by members of the Board of the surrounding area, and following the public hearings, the Board unanimously granted the application on the grounds of practical difficulty and/or unnecessary hardship. It further made each of the required findings under Section 72-21 of the Zoning Resolution. On the basis of the Board's determination at a public session held Sept. 14, 1976, petitioner brought the present proceeding to annul and set aside its determination.

It is fundamental in Zoning Law that the courts do not make new or substitute judgments, but restrict themselves to ascertaining whether there has been illegality, arbitrariness or abuse of discretion (Matter of Lemir Realty Corp. v. Larkin). A presumption exists that the Board's decision is supported by substantial evidence (Matter of First Nat'l Bank v. Sheehan, 30 A. D. 2d 912). The important elements of Section 72-21 which require that prior to granting a variance it must make 5 findings, which are (1) practical difficulties or unnecessary hardship, (2) inability to obtain a reasonable return, (3) the variance will not change the character of the neighborhood, (4) that conditions involving hardship were not self-created, (5) the proposed variance is the minimum to afford relief.

The record shows that the unique physical conditions of the zoning lot based on its irregular shape, the occupancy of other buildings on the lot, its location in 4 separate zoning districts, all contributed to the elements of hardship that would result from the denial of a variance. Of the 32,000 square feet involved in the parcel, only 41 percent of the zoning lot, 13,000 square feet, was available for construction. Evidence was offered that

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if the variance were granted a small return of 4.6 percent on a net cash investment of over $7 million was realizable, and that if the variance were not granted, a return under the requirements of the existing resolution would be less than 1 percent. The subject of financial estimates involved in construction was carefully examined by the Board on the basis of testimony on both sides, and in that regard the court must yield to the demonstrated expertise of the Board members. Similarly, in the area of estimated income and the broad subject of tax shelter benefits, the Board acted within its discretion in using its expert judgment as to the customary cash flow analysis, in evaluating a realistic rate of return for Associates (Crossroads Recreation, Inc. v. Broz, 4 N. Y. 2d 44). Much testimony was given also on the general subject as to whether the proposed development would be detrimental to the neighborhood both with regard to room space, light sufficiency, and ample parking space for automobiles. The record demonstrates that the applicant's position in that regard was amply supported by the proof and that no other conforming use was financially feasible (Matter of Envoy Towers Co. v. Klein, 51 A. D. 2d 925). Little need be said concerning the objection of the opponents of a variance, that the hardship was self-created since that subject was thoroughly examined by the Board. The record contains ample evidence that Associates had sought over a 4 year period to take reasonable measures to conform to the existing resolution, but had run into unforeseeable problems and difficulties.

On the record, therefore, it is clear not only that the Zoning Board had the authority to grant this area variance, but that the same was "minimal" as required by statute, was supported by substantial proof, and was in no respect arbitrary and capricious (Matter of Craig v. Zoning Board of Appeals, 50 App. Div. 887).

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Turning to the contentions of the petitioner that the Board did not follow its own procedural rules and thus deprived petitioners of their constitutional rights, these generally take the form of objections based on the receipt of materials submitted by Associates which were not verified, that the Board did not reply solely on sworn testimony and that petitioners had no opportunity to timely respond to various materials submitted by Associates. It is further urged that there was a lack of opportunity to cross-examine witnesses and to obtain copies of documents upon which Associates relied.

Our courts have for a great many years accepted the general principle that statements of witnesses before the Board do not have to comply with the technical requirements applicable to court testimony. They need not be under oath, and the Board may act without any witnesses at all, because it is made up of men with special qualifications of training and experience (People ex rel. Fordham Manor Reformed Church v. Walsh, 244 N. Y. 280; Matter of Von Kohorn v. Morrell, 9 N. Y. 2d 27). It appears from this record that the opponents of this variance were heard at length, and presented extensive materials to the Board in the course of several hearings from June 22 to Aug. 20, 1976. No charge is made here that the Board was in any way biased, or that it failed in its responsibility to expressly provide for notice to all interested parties with an opportunity to speak, be represented by counsel, and to submit oral or written evidence in opposition to the variance. Nor was the failure to conduct lengthy examinations a denial of their rights. A cross-examination at this type of hearing is frequently disruptive, and is uncommon at Board hearings (2 Anderson, N. Y. Zoning Law and Practice 20.16).

In all, the Board's rules provide adequate protection for all interests affected by the issuance of zoning vari-

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ances, and in this case it is clear from the record that the Board adhered to its rules scrupulously. The court finds on the entire record that the Board acted in full compliance with applicable rules of law and its own Rules of Procedures. Its determination will in all respects be affirmed. The petition will be dismissed. Settle order.

Dated: February 3, 1977.

NATHANIEL T. HELMAN,
J. S. C.

Appendix C, Order Court of Appeals, State of New York.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of December A.D. 1977

Present, Hon. Charles D. Breitel, *Chief Judge, presiding.*

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1 Mo. No. 1141

In the Matter of
the Application of 215 East 72nd Street Corporation, & ors., Appellants,
For a Judgment &c.

vs.

Joseph B. Klein, as Chairman, & ors., as Members of the Board of Standards and Appeals of the City of New York, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

Ordered, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

(Seal)

Supreme Court, U. S.
FILED
APR 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1315

JAMES F. LAWRENCE, ROBERT G. KNOTT, MARTHA McLANAHAN, ELIZABETH B. PARKINSON and 215 EAST 72nd STREET CORPORATION,

Petitioners,

vs.

JOSEPH B. KLEIN, as Chairman, PHILIP P. AGUSTA, as Vice Chairman, and HARRY M. CARROLL, JOHN J. WALSH, JOHN B. CINCOTTA, as Members of the Board of Standards and Appeals of the City of New York, SAMUEL LINDENBAUM, as Applicant, 72nd STREET ASSOCIATES and DAVID BERG,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

JAMES F. LAWRENCE, ROBERT G. KNOTT, MARTHA McLANAHAN, ELIZABETH B. PARKINSON and 215 EAST 72nd STREET CORPORATION,

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vs.

JOSEPH B. KLEIN, as Chairman, PHILIP P. AGUSTA, as Vice Chairman, and HARRY M. CARROLL, JOHN J. WALSH, JOHN B. CINCOTTA, as Members of the Board of Standards and Appeals of the City of New York, SAMUEL LINDENBAUM, as Applicant, 72nd STREET ASSOCIATES and DAVID BERG,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

(Respondents' appendix annexed)

BRIEF IN OPPOSITION TO CERTIORARI

The petition was filed too late. Jurisdictional basis to entertain it is lacking.

An accurate recital of the prior proceedings brings into proper focus the constant and costly delaying tactics that culminated in this untimely petition. This was an Article 78 proceeding brought under § 7801, *et seq.* of the *New York Civil Practice Law and Rules* (CPLR), for a judgment annulling the unanimous determination of the Board of Standards and Appeals of New York City (Board) on September 14, 1976, granting a zoning *area variance*[1] with respect to a 35 story apartment building to be constructed at East 72nd Street and Third Avenue, two busy streets in Manhattan, 100 feet wide (R 10b).[2]

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[1] The New York Court of Appeals recently noted that "[a]n 'area' variance is one which does not involve a use which is prohibited by the zoning ordinances, while a 'use' variance is one which permits the use of the land which is proscribed (*Matter of Overhill Bldg. Co.* v. *Delany*, 28 NY 2d 449, 453); 3 Anderson, *American Law of Zoning* [2d ed], §§ 18.06-18.07)". The applicant seeking an *area* variance "must satisfy the less demanding standard of showing that strict compliance with the zoning law will cause 'practical difficulties'" whereas "[o]n the other hand, since a prohibited use if permitted will result in the use of the land in a manner inconsistent with the basic character of the zone, a heavier burden is placed on the applicant" (Slip op., p. 5 of New York Court of Appeals, No. 24, Feb. 14, 1978, in *Mtr. of Con Edison Co.* v. *Hoffman, et al., etc.*, 43 NY 2d ——).

The Citizens Union Research Foundation, Inc. of the City of New York (July, 1977) in "An analysis of the decision-making process" of the "Board of Standards and Appeals", by Nancy E. Haycock, notes: *"New York City's zoning law established a pattern for zoning administration across the country. Its standards were incorporated without amendment into the model zoning enabling act prepared by the Department of Commerce. The Board of zoning appeals became a standard feature of zoning administration."* (p. 3)

[2] The pagination of petitioners' Appendix is preceded by the letter A and respondents' by the letter R. All emphasis supplied, unless otherwise noted.

On February 25, 1977, Special Term (Helman, J.) dismissed the proceedings and found it "clear from the record that the Board adhered to its rules scrupulously" and "acted in full compliance with the applicable rules of law and its own rules of procedure" (A 4a, 8a, 9a).

On July 5, 1977, the Appellate Division of the New York Supreme Court (1st Dept.) unanimously affirmed the foregoing judgment of dismissal (*215 East 72nd Street Corp.* v. *Klein, et al.*, 58 AD 2d 751, case No. 11, 396 NYS 2d 22, A 1a-3a). On August 1, 1977, petitioners served notice of appeal to the New York Court of Appeals, specifying that it "is an appeal from *a final order* of the Appellate Division" taken as of right (CPLR §5601(b) subd. 1) claiming "there was directly involved the construction of Article I, Section 6 of the Constitution of the State of New York and Amendment XIV, Section I of the Constitution of the United States." On August 5, 1977 these respondents promptly moved to dismiss the appeal, which motion was granted by the Court of Appeals on September 13, 1977 (R 11b):

> "upon the ground that no substantial constitutional question is directly involved" (*215 East 72nd St. Corp.* v. *Klein*, 42 NY 2d 1012-13, 368 NE 2d 286 [1977])

Petitioners' brief does not annex a copy of that order which recites the foregoing as the basis thereof, but disingenuously states (p. 2) that "the Court of Appeals granted a motion by respondents to dismiss the appeal" and *"rendered no opinion"*.

The dismissal of the appeal by the New York Court of Appeals "for want of a substantial constitutional question is 'tantamount to a dismissal of the constitutional issues on the merits.' *Turco* v. *Monroe County Bar Association*, 554 F.2d 515, 521 (2d Cir.) *cert. denied*, 46 U.S.L.W. 3198 (U.S. Oct. 4, 1977) (No. 76-1816); *McCune* v. *Frank*, 521 F. 2d 1152, 1155 (2d Cir. 1975)" (Slip op. No. 69, p. 14. *Ellentuck* v. *Klein*, —— F. 2d —— [2d Cir.] Jan. 4, 1978.) The order of dismissal of September 13, 1977 was the final determination by the State's highest court on the federal constitutional question presented, and was not subject to further review in the State courts. Petitioners therefore could, and should have filed their petition within 90 days thereafter (28 USCA § 2101(c)). On March 17, 1978 this petition was belatedly filed, 185 days later. No request for an extension of time was made or granted (*cf. Knickerbocker Printing Corp.* v. *U.S.*, 99 L ed 1292; *Goldman, et al.* v. *Fogarty*, 99 L ed 1295).

On October 12, 1977, petitioners made application at the Appellate Division for leave to appeal from its order of affirmance which was denied October 25, 1977 (R 13b). Then followed an application for leave to appeal to the Court of Appeals returnable in that Court on December 12, 1977 and advanced by the clerk thereof to December 5, 1977 which was denied December 19, 1977 (A 10a). The resort to these subsequent applications at the Appellate Division and in the Court of Appeals to bring before the latter court matters, other than or in addition to the constitutional question rejected by the prior order of dismissal, did not extend the time for the filing of this petition (*cf. Cox Broadcasting Corp.* v. *Cohn*, 420 U S 469, 481-5 [1975]).

Statement of the case

The area variance received the overwhelming support of the local Community Planning Board that conducted two well attended public hearings; it also received the support of the Chairman of the City Planning Commission. The Board was unanimous in its determination, after having itself conducted four public hearings (A 5a, 8a). There was a "sun study" filed with the Zoning Board at its request, showing the juxtaposition of the properties on both sides of 72nd Street, a thoroughfare 100 feet wide, and the inconsequential effect that the challenged structure would have on petitioners' property on the longest day of the year.[3]

The Board, in the language of Chief Judge Cardozo (*People ex rel. Fordham Manor Ref. Church* v. *Walsh,* 244 N.Y. 280, 287, 155 NE 575 [1927]) is composed "of men with special qualifications of training and experience." The New York City Charter (§ 661, subd. b) mandated (at that time, 1976) that of the Board's five members, two must be licensed architects with at least fifteen years of experience, one must be a licensed structural engineer with at least fifteen years of experience and one a licensed mechanical engineer with a like term of experience.

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[3] Out of 62 lot owners required by the Board to be given notice, petitioner 215 East 72nd Street Corp. and four of its shareholder tenants were the only ones who brought the proceedings challenging the variance. Although the petition enumerates (pp. 6-7) the area variances sought, such as a "greater ratio of total floor space to the lot area," a variation as to the "set back from the lot line" and as to the number of zoning rooms, also, as to the "mandated number of off-street parking spaces" etc., there is no showing of any damage to the petitioners or any detriment to the community. On the contrary, the proposed structure will enhance the local area.

The meticulous findings of the Board, (its salient and controlling findings are annexed [R 1b-10b *infra*]), described the action taken by the Manhattan Borough Superintendent which preceded the variance application and the proceedings that followed. The Board then noted that at the hearings full opportunity was granted to petitioners, their representatives and witnesses, as well as to "all persons who appeared in opposition" to be heard and to present evidence and arguments in support of their respective positions. While the application was pending "a committee of the Board inspected the subject property and surrounding areas and became fully informed as to the existing conditions." (R 1b).

The record before the Board showed that there were many existing high rise luxury apartments built within the last ten to fifteen years in the neighborhood surrounding this zoning lot. Not only was the proposed structure consistent with the neighborhood zoning pattern, but the variance under attack actually helped preserve an important degree of heterogeneity in the neighborhood (R 9b). Suffice it to say, the carefully considered opinion of Mr. Justice HELMAN at Special Term succinctly and accurately sets forth the conclusions justifiably reached, by the Board and reflected in their findings:

> "The record shows that the unique physical conditions of the zoning lot based on its irregular shape, the occupancy of other buildings on the lot, its location in 4 separate zoning districts, all contributed to the elements of hardship that would result from the denial of a variance. Of the 32,000 square feet involved in the parcel, only 41 percent of the zoning lot, 13,000 square feet, was available for construction. Evidence was offered that if the variance were granted a small return of 4.6 percent

on a net cash investment of over $7 million was realizable, and that if the variance were not granted, a return under the requirements of the existing resolution would be less than 1 percent.

The subject of financial estimates involved in construction was carefully examined by the Board on the basis of testimony on both sides, and in that regard the court must yield to the demonstrated expertise of the Board members. Similarly, in the area of estimated income and the broad subject of tax shelter benefits, the Board acted within its discretion in using its expert judgment as to the customary cash flow analysis, in evaluating a realistic rate of return for Associates (Crossroads Recreation, Inc. v. Broz, 4 N.Y.2d 44).

Much testimony was given also on the general subject as to whether the proposed development would be detrimental to the neighborhood both with regard to room space, light sufficiency, and ample parking space for automobiles. The record demonstrates that the applicant's position in that regard was amply supported by the proof and that no other conforming use was financially feasible (Matter of Envoy Towers Co. v. Klein, 51 A.D. 2d 925).

Little need be said concerning the objection of the opponents of a variance, that the hardship was self-created since that subject was thoroughly examined by the Board. The record contains ample evidence that Associates had sought over a 4 year period to take reasonable measures to conform to the existing resolution, but had run into unforeseeable problems and difficulties." (A 6a-7a)

The Court concluded that:

> "On the record, therefore, it is clear not only that the Zoning Board had the authority to grant this area variance, but that the same was 'minimal' as required by statute, was supported by substantial proof, and was in no respect arbitrary and capricious (Matter of Craig v. Zoning Board of Appeals, 50 App. Div. 887." (A 7a)

On the procedural aspects, the Court found that:

> "It appears from this record that the opponents of this variance were heard at length, and presented extensive materials to the Board in the course of several hearings from June 22 to Aug. 20, 1976. No charge is made here that the Board was in any way biased, or that it failed in its responsibility to expressly provide for notice to all interested parties with an opportunity to speak, be represented by counsel, and to submit oral or written evidence in opposition to the variance. Nor was the failure to conduct lengthy examinations a denial of their rights. A cross-examination at this type of hearing is frequently disruptive, and is uncommon at Board hearings (2 Anderson, N. Y. Zoning Law and Practice 20.16).
>
> In all, the Board's rules provide adequate protection for all interests affected by the issuance of zoning variances, and in this case it is clear from the record that the Board adhered to its rules scrupulously. The court finds on the entire record that the Board acted in full compliance with applicable rules of law and its own Rules of Procedures. Its determination will in all respects be affirmed." (A 8a-9a)

The Appellate Division unanimously held "we affirm for the reasons stated at Special Term" (*215 East 72nd St. Corp.* v. *Klein, et al., supra* p. 2; A 1a-3a).

The constitutional challenge properly rejected in the State courts is not worthy of review here.

The Appellate Division, although unanimously affirming "for the reasons stated at Special Term", was seemingly "perturbed" because the Board "merely noted that required findings *had been made*" and "[i]t was not until the answer and the return in this Article 78 proceeding that the facts found, which led to its conclusions were disclosed." (A 3a). The Appellate Division itself recognized that "the practice condoned, if not upheld, by the Court of Appeals has been to allow reliance on findings contained in the return to the petition. (*Matter of N.Y. City Housing & Development Bd.* v. *Foley,* 23 A.D. 2d 84, *aff'd without op.,* 16 N.Y. 2d 1071; see *Matter of Elliott* v. *Galvin,* 33 N.Y. 2d 594, 596.)" (A 3a)

In moving to dismiss the appeal taken to the New York Court of Appeals as of right upon constitutional grounds (p. 2, *supra*) respondents successfully contended:

> "Here there was no denial of due process because the detailed findings were set forth in the answer to this proceeding rather than in the formal decision that was rendered on the basis of a record which has been judicially recognized below as amply clear and convincingly supporting the findings. The alleged defect, if any, could be readily remedied by the simple mechanic of directing a remand to the Board to incorporate the factual detailed findings as part of the formal decision that was rendered. That, as it has been judicially recognized, would be an exercise in futility. *Nor would there be the slightest reason to suppose in view of the protracted, extended and careful consideration given*

> *to the matter by the Board, as this record reflects, that there would be any change in substance in the findings of fact that were so carefully delineated.*"[4]

The Court of Appeals evidently did not regard the narrow issue which "perturbed" the Appellate Division of sufficient constitutional dimension to merit consideration. Nor did the State courts find that petitioners on the subsequent applications for leave to appeal at the Appellate Division and in the Court of Appeals, presented any issue, constitutional or otherwise, that merited further review.

Petitioners (p. 12) lament that "[t]he 'due process explosion' has not yet reached zoning or related land use proceedings", pointing out that "[b]eginning with *Village of Euclid* v. *Ambler Realty Co.,* 272 US 365 (1926), this Court has decided 13 zoning cases, all of which have involved *substantive* rights" (emphasis in original). This case calls for no expansion, as petitioners' brief contends, (p. 11) of the "due process explosion" to nuclear proportions, by adding challenged area variances to the "considerable progeny" stated to be spawned by *Goldberg* v. *Kelly,* 397 US 254 [1970]. Nor does the parade of authorities relied on in the petition (footnotes 8-10; pp. 11-13) justify any such intolerable increase in this Court's heavy caseload. (*cf. Vermont Yankee Nuclear Corp.* v. *NRDA,* 46 U.S.L.W. 4301, Apr. 3, 1978 Nos. 76-419 and 76-528).

Although "in the case of an area variance, a significant factor is the magnitude of the variance sought, since the

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[4] In *Mtr. N.Y.C. Housing Bd.* v. *Foley, supra,* the same court earlier held that "a remand for the sole purpose of transposing the material in the return to a new formal decision would serve no useful purpose." (p. 87 [1965]). A like conclusion was reached by the Court of Appeals in *Ellentuck* v. *Klein,* 39 NY 2d 743 [1976] dismissing an appeal presenting a like constitutional challenge.

greater the deviation the more likely it is that the impact on the community will be severe" (*Mtr. of Con Edison Co.* v. *Hoffman, et al., etc., supra*), no such compelling situation is here present. More important, it is not shown that controlling evidence to that effect was introduced and disregarded or controlling proof was offered and rejected, resulting in the denial of an adequate hearing, or in what respect the detailed, specific and impressive findings of the Board were or are demonstrably erroneous.

The New York Zoning resolution expressly provides (72-21) that "[w]here it is alleged that there are practical difficulties or unnecessary hardship, the Board may grant a variance in the application of the provisions of this resolution" (A 4). The legislature has thus delegated to the Board, an expert body, the authority and power to grant variances under appropriate circumstances. The Court of Appeals in *Matter of Lemir Realty Corp.* v. *Larkin,* 11 NY 2d 20, 181 NE 2d 407 [1962] emphasizes that it is:

> "the settled rule that in reviewing board actions as to variances • • • the courts do not make new or substitute judgments but restrict themselves to ascertaining whether there has been illegality, arbitrariness or abuse of discretion." (p. 24)

Mr. Justice Helman, whose decision here was sustained in the appellate courts, noted:

> "No charge is made here that the Board was in any way biased, or that it failed in its responsibility to expressly provide for notice to all interested parties with an opportunity to speak, be represented by counsel, and to submit oral or written evidence in opposition to the variance." (A 8a)

Since an area variance does not alter the basic character and nature of the community as does a use variance, there necessarily exists greater flexibility in the granting of such variances. An area variance merely releases a land owner from complying with the strict letter of a zoning ordinance so that his land may be put to a permitted use. The Board necessarily is vested with broad discretion as to the nature and scope of the hearing. The conventions of a formal trial and the presentation, examination and cross-examination of witnesses and rules as to hearsay evidence in the very nature of things cannot be rigidly required or made mandatory (*People ex rel Fordham Manor Reformed Church* v. *Walsh, supra; Matter of Von Kohorn* v. *Morrell,* 9 NY 2d 27, 32, 172 NE 2d 287 [1961].)

In *Morrissey* v. *Brewer,* 408 US 471 [1972], Chief Justice Burger stressed the need for flexibility that necessarily must be attuned to the particular circumstances:

> "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. '[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function as well as of the private interest that has been affected by a governmental action.' • • • To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations

calling for procedural safeguards call for the same kind of procedure." (p. 481)

This Court later in *Matthews* v. *Eldridge*, 424 US 319 [1976], reaffirming *Morrissey* treated with the variables which determine "what process is due":

> "'"[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' • • • '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' • • • Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. • • • *More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.*" (pp. 334-5)

It was on the basis of the earlier decision of this Court in *Goldberg* v. *Kelly*, 397 U.S. 254 [1970] that the Appellate Division was "perturbed" as to whether the Board's determination that the "required findings *had been made*" but, which were not disclosed "until the answer and return in this Article 78 proceeding" were filed, "accords with procedural due process". Although the Appellate Division, as already noted considered that "a question properly raised" (A 3a), the Court of Appeals rejected it as an unsubstantial constitutional challenge and dismissed the appeal (p. 2 *supra*). Thereafter, both the Appellate Division and Court of Appeals denied petitioners' application for leave to have this case reviewed by the Court of Appeals (p. 3 *supra*). Hence no question of constitutional magnitude survived worthy of review here.

It is unnecessary to engage in an esoteric dissertation as to whether the Board's determination is adjudicative or legislative, since procedural due process in full measure was accorded to all concerned, even to those who manifested an interest but who could not materially be detrimentally affected or legally damaged (R 9b). Variances, as petitioners' brief recognizes (p. 16) "are a necessary flexibility device". Admittedly, as the petition acknowledges (p. 16), there are "tens of thousands of variance applications each year" occasioned by innumerable and varying factors whose impact may not be readily estimated or measured, much less straightjacketed in a uniform definition or a rigid regulation. Flexibility in that fluid situation, indeed informality to a considerable degree is reasonably necessary and serves to enhance expeditious disposition that might otherwise prove harmful and costly, perforce of inordinate delay. Judge FRIENDLY's article (*Some Kind of Hearing*, 123 U.Pa. L. Rev. 1267 [1975]), so greatly stressed in the petition (pp. 7, 11, 20, 22) sagely comments:

> "• • • with the vast increase in the number and types of hearings required in all areas in which the government and the individual interact, common sense dictates that we must do with less than full trial-type hearings even on what are clearly adjudicative issues." (p. 1268)

This record presents no need for the "over-judicialization of administrative procedures", nor to broaden the scope of judicial review. An administrative agency such as the Board "must be entitled reasonably to limit their number [of witnesses] and the scope of examination" (FRIENDLY *supra* p. 1282).

It cannot be denied that unsworn statements, either oral or in writing, or those that may fall in the category of hearsay may be informative and indeed essential to the consideration and determination of an administrative agency whose functions would be impaired, if not rendered ineffective, if it were compelled to resort to the formalities of a conventional trial and be bound by rigid rules of evidence. In any event, this record does not call upon this Court to evaluate, much less set up formal stringent rules of procedural due process with respect to zoning area variances.

Petitioners' basically contend (p. 15) that "it is almost universally required that a zoning board of appeals make specific findings and base its decisions on such findings." It cannot be denied that that is precisely what was done here. The Petition designedly omits from its appendix and completely ignores the meticulous and comprehensive findings upon which the Board's determination rested (R. 1b-10b).

Petitioners' structure, diagonally across the street, was built in 1928. The Board's findings established that this plot was assembled in 1969 at a cost of $3¼ million exclusive of huge operating cash losses. It was irregular in area upon which seven outmoded buildings and stores were situated. Inherently, the proposed structure on the assembled irregular lot necessitated zoning variances that could not and did not detrimentally affect the locale and adjacent structures or the community residents in the

vicinity (R 9b). The practical difficulties and inordinate delay entailed thereby are graphically shown in the Board's detailed findings (R 1b-9b). A cursory glance at the findings that treat with the mere relocation of the tenants in rent controlled apartments evince the obstacles encountered and the inordinate time and burdensome fashion in which they were compelled to be ultimately resolved and at a huge cost (R 6b-9b).

This Certiorari proceeding was brought by petitioners *six weeks after* the proposed project was commenced on February 1, 1978 by the demolition of two of the existing buildings. Excavation, underpinning and foundation work have progressed very substantially. Millions of dollars have already been invested. And as the Board noted in its findings:

> "Due to its having been largely cleared and vacated, the subject property is producing very little income, and, yet, due to its value, condition and location, it *has engendered staggering operating losses.*" (R 6b).

As Mr. Justice Helman at Special Term noted, "[n]o charge is made here that the Board was in any way biased" (A 8a). More important, the petition does not undertake to demonstrate in what respect, if any, the meticulous findings made by the Board can be shown to be unwarranted by the record, or in what respect, if any, petitioners were denied full opportunity to establish that. Special Term pointed out there was adequate "notice to all interested parties, with an opportunity to speak, be represented by counsel and to submit oral and written evidence in opposition to the variance" (A 8a). As already indicated, the unanimous Appellate Division expressly affirmed "for the reasons stated at Special Term" (A 2a).

After the New York Court of Appeals dismissed petitioners' appeal taken as of right upon the asserted constitutional ground (p. 2, *supra*), both the Appellate Division and the Court of Appeals thereafter decided that the record here presents no question, constitutional or otherwise, that merited further review by the State's highest court (p. 3, *supra*).

With the situation in the foregoing unassailable posture, petitioners' brief with ill grace and with the same lack of candor already noted (p. 2, *supra*), endeavors to give an unfavorable, if not sinister cast, derogatory of respondent Lindenbaum's experience and expertise in this field. Petitioners' brief (p. 19) quotes the Citizens Union study, to the effect that respondent Lindenbaum, the applicant here, "was involved only in Manhattan cases 89% of the time as a representative of a professional developer" and "the attorney in 76% of the cases involving more than 16 stories", and that it "is worth noting" he seldom did "lose a case". Petitioners' brief omits the reference by the Citizens Union tract that "this can partially be explained" because of the "effective presentations" made by counsel who was "well prepared with persuasive legal, policy and planning arguments" and that the attorneys in this field "can be very selective in their choice of clients"; also it may be added, in their choice of cases.[5]

It is significant that not a single court decision is cited, which reflects adversely upon the professional expertise of counsel, or the professional services he rendered and the results achieved. And it must be assumed, as indeed was the case here, since the Court at Special Term, the Appellate Division and the Court of Appeals without dissent sustained the result that his expertise produced, petitioners

[5] Citizens Union Analysis, *supra* at pp. 12-13.

can have no just quarrel except with themselves and their counsel for the outcome. It is disquieting to find resort to such dubious strategy which has no proper place in the petition.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX

Findings of the Board Set Forth in its Answer and Return to Petitioners' Article 78 Proceeding

• • •

24. The application was afforded a public hearing by the Board on June 22, 1976, after due notice by publication in the bulletin of the Board and notice by mail to all persons entitled to such notice in accordance with the Board's Rules of Procedure. The hearing was continued on July 13, 1976, July 27, 1976, and September 14, 1976.

25. At the hearings, the board afforded the applicants' representatives and witnesses and all persons who appeared in opposition to the application and their representatives a full opportunity to be heard, to present evidence and to make argument in support of their respective positions.

26. While the application was pending before the Board, a committee of the Board inspected the subject property and the surrounding area and became fully informed as to existing conditions.

27. On September 14, 1976, after giving due consideration to all matters connected with the application before it, the Board, by resolution adopted that day by a unanimous vote of its members, a copy of which is contained on page one of the Transcript of Record attached hereto, determined that the application before it was an appropriate case under Section 72-21 of the Zoning Resolution "to permit in a R8, R10, C1-5 and C1-9 district on a plot with two existing structures, the erection of a 35-story mixed building that exceeds the adjusted floor area ratio,

height of the front wall and lot area per room, encroaches on the required distance between buildings and with less than the required accessory parking, ON CONDITION that all work shall substantially conform to drawings filed with this application, marked "Received March 23, 1976," 1 sheet; "May 25, 1976," 6 sheets RBQ Deputy Director, and "August 20, 1976," 1 sheet; and that all laws, rules and regulations applicable be complied with, and that substantial construction be completed within one year from the date of this resolution."

28. In granting the application for the variance pursuant to Section 72-21 of the Zoning Resolution, subject to the conditions set forth in its resolution, the Board, on the basis of evidence in the record, and inspection of the subject property by a committee of the Board, and by reason of the expert knowledge of the Board, made the following findings:

A. The subject property is identified as 201-209 East 71st Street, 200-206 East 72nd Street, 1231-1247 Third Avenue, Manhattan, New York, Block 1426, Lots 1, 5 and 44.

B. The subject property consists of an "L" shaped parcel occupying the entire 204′4″ blockfront on the east side of Third Avenue between East 71st Street and East 72nd Street and has frontage of 127′11″ on the south side of East 72nd Street and 185′0″ on the north side of East 71st Street. From its north eastern extremity the subject property extends to a depth of 102′2″ south of East 72nd Street (to the center line of the block), thence easterly 57′1″ along th center line to a point 185′0″ east of Third Avenue thence southerly 102′2″ to East 71st Street.

C. According to the zoning maps which accompany and are a part of the Zoning Resolution (see Zoning Map 8c), that portion of the subject property which lies north of the center line of the block (the "northerly portion") and within 100′0″ of Third Avenue is zoned C1-5 within an R10 district, and the balance of said northerly portion is zoned R10. The portion which lies to the south of the center line (the "southerly portion") and within 125′0″ of Third Avenue is zoned C1-9, the balance of said southerly portion being zoned R8. The subject property is located within Manhattan Community Planning Board No. 8.

D. The subject property contains a total lot area of approximately 31,971.03 square feet, of which 25,840.83 square feet (or 80.83%) are located in R10 or R10 equivalent districts (C1-5 and C1-9) and 6,130.2 square feet (or 19.17%) are located within an R8 district.

E. The subject property is presently improved, in part, with a partially occupied four-story mixed-use building, known as 201 East 71st Street, built in 1870 and remodelled in 1935, which contains some 33 apartments and some six vacant stores having frontage along Third Avenue. Said building is located on the southerly portion of the subject property, and has frontage of 102′2″ on Third Avenue and frontage of 90′ on East 71st Street. Also having frontage on East 71st Street (approx. 75′) is the building known as 207 (or 207-209) East 71st and occupied by the Dominican Congregation as a residence for women. The fee title to this portion of the subject property (the "Air Rights Portion"), including the yard behind it, is vested in said Dominican Congregation, who have leased it to the applicant for a term of almost 99

years, taking back a sub-lease thereto except for the unused excess floor area attributable to it. There are also two small, vacant, four-story buidings which are located on the notherly portion of the subject property (206 East 72nd Street and 1243 Third Avenue), both of which the applicant plans to demolish in order to clear a site for the proposed new building. The balance of the subject property is open, vacant and fenced, the structures previously located thereon having been demolished by applicant in preparation for its planned redevelopment of the subject property.

F. With this application the applicant seeks a variance pursuant to Section 72-21 of the Zoning Resolution, to permit the erection, on the northerly portion of the subject property, of a new 35-story mixed-use building which exceeds the permitted floor area ratio, height of front wall and lot area per room limits, encroaches on the required distance between buildings on the same zoning lot and contains less than the required accessory parking.

G. The principal part of the subject property (a parcel occupying the entire 204 foot block-front on Third Avenue and extending to a depth of 110 feet on both 72nd and 71st Streets) was assembled by the applicant by December, 1969, at a total cost, exclusive of operating cash losses of almost three and a quarter million dollars. In March 1970 applicant filed plans for a hi-rise apartment house with stores to occupy said site and the plans were approved in late 1971. In early 1972 the applicant commenced proceedings in the Office of Rent Control of the City of New York to obtain Certificates of Eviction permitting vacation and demolition of all buildings. During the pendency of these proceedings, the applicant obtained

by lease, in May 1972, the "air rights" to the adjoining property owned by the Dominican Congregation, 207-209 East 71st Street. In December of 1972, the applicant also acquired (at a cost of $175,000) and added to the subject property a contiguous lot having 17.11 feet frontage at 206 East 72nd Street thereby bringing the subject property to its present dimensions.

H. During 1972 applicant terminated the leases for the stores along Third Avenue and demolished four of the buildings on the subject property, leaving 1243 Third Avenue and 201 East 71st Street standing. In May of 1972, applicant filed an application (Cal. No. BZ-365-72) with this Board for a variance which would allow the construction on the subject property (which then did not include the later-added small parcel known as 206 East 72nd Street) of a 38-story mixed use building exceeding in that portion of the property located in an R10 district the maximum adjusted floor area ratio permitted therein and encroaching on the minimum distance required between buildings. The proposed 38-story building and its adjoining plazas would have occupied substantially all of the subject property except the Air Rights Portion, (see Transcript of Record, pp. 211-L, -M, -N, and -O). On December 12, 1972, this Board duly granted said application for a variance by unanimous resolution. Said variance allowed, in effect, the transfer of most of the 53,979 sq. feet of unused floor area attributable to the Air Rights Portion of the subject property to be transferred to the proposed building, which would have a total of some 311,577.65 sq. ft. of floor area. Said variance also allowed the proposed building to abut in part the existing building on the Air Rights Portion. Otherwise, the proposed building complied with applicable bulk regulations.

Findings of the Board Set Forth in its Answer and Return to Petitioners' Article 78 Proceeding

I. Despite diligent continuous efforts to do so, and despite its readiness to proceed in all other respects, the applicant was unable, as of Summer 1975, to vacate (for purposes of their demolition) two buildings on the subject property. This was due in part to vigorous resistance to relocation by the tenants of three rent-controlled apartments at 1239-43 Third Avenue and 15 such apartments at 201 East 71st Street, and in part to delays occurring in the eviction process which were not caused by neglect or fault on the part of applicant. In March 1975, counsel for the applicant was approached by the Chairman of the Zoning Committee of Community Planning Board No. 8, on behalf of the tenants, with a proposal to resolve the matter by relocating the three tenants remaining at 1243 Third Avenue to 201 East 71st Street, so that applicant would be free to clear and build on the northerly portion of the subject property. Finally on October 31, 1975, after extensive negotiations, the applicant made an agreement with the tenants which provided, inter alia, for the said relocation of the three tenants remaining at 1243 Third Avenue to 201 East 71st Street, surrender by applicant of the Certificates of Eviction which it had obtained, discontinuance with prejudice of all proceedings in Court and before the Office of Rent Control to vacate the premises, preservation of the statutory rents for three years and continuation of the tenancies under Rent Stabilization, and eventual remodelling of 201 East 71st Street at a cost of $250,000. These terms were agreed to in good faith by the applicant to avoid further costly delay of its redevelopment plans for the subject property. Due to its having been largely cleared and vacated, the subject property is producing very little income, and, yet, due to its value, condition and location, it has engendered staggering operating losses.

Findings of the Board Set Forth in its Answer and Return to Petitioners' Article 78 Proceeding

J. The period between March 1975 and the filing of this application was spent in good faith efforts by applicant to obtain a special permit from the City Planning Commission to allow it to build a mixed building with sufficient floor area to afford the applicant a reasonable return on its investment. This effort was ultimately unsuccessful, thereby precipitating the instant application to this Board for a variance based practical difficulties and unnecessary hardship.

K. There are unique physical conditions peculiar to and inherent in the zoning lot comprising the subject property. As a result of these unique physical conditions, practical difficulties and unnecessary hardship arise in complying strictly with the bulk provisions of the Zoning Resolution, and such practical difficulties and unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood and district in which the subject property is located.

L. The subject property is physically unique in that a major portion (9,180 sq. ft.) of it is improved with a four-story mixed use building which, despite diligent, good faith efforts extending over several years, applicant cannot vacate except at the cost of further, very costly and unpredictable delay. Since another 9,690 sq. feet is included within the Air Rights Portion and its adjoining alley, only some 13,101 sq. ft. is physically available, as a practical matter, for new construction, despite the overall lot area of 31,971 sq. ft. Applicant's difficulties are illustrated by the fact that a building *complying* in all respects with applicable bulk regulations (except for the required distance between it and 201 E. 71st Street) would have to be 62 stories (or 558′) tall (as compared with

a 55′ depth and an 81′ width) in order to provide comparable floor area to the proposed structure. (T.R. 211-H, -I). The cost of building such a structure would be prohibitive in comparison with the income which it would produce.

M. Because of the physical conditions there is no reasonable possibility that the development of the subject property in strict compliance with the applicable bulk provisions of the Zoning Resolution will yield a reasonable return, and, therefore, the grant of variance is necessary to enable applicant to realize a reasonable return from the subject property.

N. The cost of acquiring the land and leasehold comprising the subject property is over $3,400,000. The operating expenses incurred by applicant in maintaining part or all of the subject property from 1969 through 1975 (taxes, interest, fuel, utilities, labor, maintenance, etc.) totalled almost three million dollars as compared with only about one-half million in income during that period. Projected operated expenses through 1976 continue at the same rate, while the annual income from the subject property has diminished to about $25,000, due to its having been extensively cleared and vacated in preparation for the proposed redevelopment. Thus the total actual and projected land cost through construction and completion of the proposed new building of $6,650,000 is realistic and probable.

O. Applicant proposes to build on the northerly portion of the subject property a thirty-five story, mixed-use building having floor area of 357,775 sq. ft. and containing 433 apartments and 8,190 sq. ft. of store space at ground level with 2,800 sq. ft. of commercial space below

the stores, plus 40 garage spaces in the cellar. The estimated construction costs of $36.00 per square foot cited by applicant (T.R. 61), as well as the other related project costs, totalling $24,720,700, are reasonable and credible for the proposed development at the location of the subject property. Since applicant anticipates an FHA mortgage of $17,636,300, its net cash equity investment in the completed project would be $7,084,400. The probable net income from the project less than total operating and maintenance expenses, taxes and mortgage amortization and interest would leave applicant with a net cash flow of $322,500, or a return of 4.6% per annum on its investment of $7,084,000. The proposed project would thus afford applicant no more than a reasonable return.

P. The variance granted herewith will not alter the essential character of the neighborhood or district in which the subject property is located, nor will it impair the appropriate use and development of adjacent property and it will not be detrimental to the public welfare. The proposed building is typical of recent development in the upper East Side of Manhattan, especially in the neighborhood of the subject property. Indeed, within the four hundred feet notification area alone there are a 35-story building, a 34-story building, two 27-story buildings, and three 20-story buildings. The neighborhood in which the subject property is located contains many high-rise residential buildings, and is a growing, desirable area where the demand for quality housing is ever-increasing. The density of the proposed building, especially in view of the continued existence of 201 E. 71st Street (the four-story mixed use building on the southerly portion) and 207 E. 71st Street (the Dominican Congregation Resi-

Findings of the Board Set Forth in its Answer and Return to Petitioners' Article 78 Proceeding

dence) will not cause an unreasonable burden to the existing facilities and resources of the district. Although the overall floor area ratio of the proposed development on the subject property will be 12.7, the residential floor area ratio of the development will be less than 12 and, if the building at 201 East 71st Street was demolished, the overall floor area ratio of the entire proposed development on the subject property would be less than 12. The widths of Third Avenue and East 72nd Street (both of which are exceptionally wide thoroughfares) mitigate the effects of the lack of initial setback and the required Tower setback. The provision of only 40 parking spaces will not adversely affect the neighborhood since commercial parking facilities are available in the area to an extent adequate to absorb such additional burden as the proposed building might create.

Q. The practical difficulties and unnecessary hardship have not been created by the owner or its predecessors in title. They are inherent in the land and result from the applicablity of the provisions of the Zoning Resolution to this Zoning lot.

R. Within the intent and purpose of the Zoning Resolution, the variance granted is the minimum variance necessary to afford relief.

Order of the Court of Appeals Granting Respondents' Motion to Dismiss Petitioners' Appeal to the Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Thirteenth day of September A. D. 1977.

Present,

HON. CHARLES D. BREITEL,
Chief Judge, presiding.

Mo. No. 826

In the Matter of

215 EAST 72ND STREET CORPORATION, &ors.,

Appellants,

vs.

JOSEPH B. KLEIN, as Chairman, &ors., as Members of the Board of Standards and Appeals of the City of New York, SAMUEL LINDENBAUM, *et al.*,

Respondents.

A motion having heretofore been made herein upon the part of the respondents Samuel Lindenbaum, 72nd Street Associates and David Berg (1) to dismiss the appeal

Order of the Court of Appeals Granting Respondents' Motion to Dismiss Petitioners' Appeal to the Court of Appeals

taken as of right by the appellants in the above cause to this Court or to provide a calendar preference for argument of the appeal, and (2) to *sua sponte* deny leave to appeal to the Court of Appeals &c., papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion to dismiss the appeal taken as of right be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for a preference be and the same hereby is dismissed as academic; and it is

ORDERED, that the said motion for *sua sponte* denial of leave to appeal &c. be and the same hereby is denied.

JOSEPH W. BELLACOSA
Clerk of the Court

Order of the Appellate Division Denying Petitioners' Motion For Leave to Appeal to the Court of Appeals

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 25, 1977

Present—Hon. Francis T. Murphy, Jr., Presiding Justice,
Theodore R. Kupferman,
Herbert B. Evans,
Louis J. Capozzoli, Justices.

In the Matter of the Application of

215 EAST 72nd STREET CORPORATION, JAMES F. LAWRENCE, ROBERT G. KNOTT, MARTHA MCLANAHAN and ELIZABETH B. PARKINSON,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

—against—

JOSEPH B. KLIEN, as Chairman, PHILIP P. AGUSTA, as Vice Chairman, and HARRY M. CARROLL, JOHN J. WALSH, JOHN B. CINCOTTA, as Members of the Board of Standards and Appeals of the City of New York, SAMUEL LINDENBAUM, as Applicant, 72nd STREET ASSOCIATES and DAVID BERG,

Respondents-Respondents.

M-3491

Order of the Appellate Division Denying Petitioners' Motion For Leave to Appeal to the Court of Appeals

The above-named petitioners-appellants having moved for leave to appeal to the Court of Appeals from the order of this Court entered on July 5, 1977,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavits of David Sive in support of said motion and the affidavit of David Berg and the statement of Leonard Olarsch in opposition thereto, and after hearing Mr. David Sive for the motion and Messrs. David Berg and Leonard Olarsch opposed,

It is ordered that said motion be and the same hereby is denied with $20 costs.

ENTER:

JOSEPH J. LUCCHI
Clerk

Supreme Court, U. S.
FILED
APR 19 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1315

JAMES F. LAWRENCE, ROBERT G. KNOTT, MARTHA McLANAHAN, ELIZABETH B. PARKINSON and 215 EAST 72nd STREET CORPORATION,

Petitioners,

vs.

JOSEPH B. KLEIN, as Chairman, PHILIP P. AGUSTA, as Vice Chairman, and HARRY M. CARROLL, JOHN J. WALSH, JOHN B. CINCOTTA, as Members of the Board of Standards and Appeals of the City of New York, SAMUEL LINDENBAUM, as Applicant, 72nd STREET ASSOCIATES and DAVID BERG,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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L. KEVIN SHERIDAN,
LEONARD OLARSCH,
of Counsel.

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IN THE
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OCTOBER TERM, 1977

No. 77-1315

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Respondents.

BRIEF OF RESPONDENTS' MEMBERS OF THE BOARD OF STANDARDS AND APPEALS IN OPPOSITION TO CERTIORARI

Statement

(1)

This brief is submitted on behalf of Respondents, members of the Board of

Standards and Appeals of The City of New York, in opposition to the petition for Certiorari. This case has been fully briefed by the respondents, Samuel Lindenbaum, 72nd Street Associates, and David Berg, and as their position coincides with the Board's, we adopt such brief as our own in opposition to the petition.

(2)

We note, additionally, that the Board of Standards and Appeals is confronted with a very large number of appeals annually - only a small fraction of which reach the courts for review. Under these circumstances, for the Board to prepare detailed findings in each case, as petitioners suggest, would cast an unwarranted burden on its ability to function properly.

Morever, the New York Court of Appeals has consistently upheld the Board when its

return contains factual findings sufficient for intelligent review by the courts. People ex rel Fordham Manor Reformed Church v. Walsh, 244 N.Y. 280 (1927); Matter of Elliot v. Galvin, 33 N Y 2d 594 (1973). And, as the Special Term and Appellate Division here found the Board's grant of the variance fully supported by such facts, the question really comes down to the appropriateness of a "remand for the sole purpose of transposing the material in the return to a new formal decision." Matter of N.Y.C. Housing Board v. Foley, 23 AD 2d 84, 87 (1st Dept., 1965) aff'd 16 N Y 2d 1071 (1965). There, the Court said that such procedure "would serve no useful purpose."

Bypassing the untimeliness of the petition, warranting dismissal in the first instance, the contentions sought to be pre-

sented here are not worthy of review.

CONCLUSION

The petition should be denied.

April 11, 1978

Respectfully submitted

ALLEN G. SCHWARTZ,
Corporation Counsel,
Attorney for the Members
of the Board of Standards
and Appeals of The City
of New York,

L. KEVIN SHERIDAN,
LEONARD OLARSCH,
of Counsel.

Supreme Court, U. S.
FILED
MAY 4 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1315

JAMES F. LAWRENCE, ROBERT G. KNOTT, MARTHA McLANAHAN, ELIZABETH B. PARKINSON and 215 EAST 72ND STREET CORPORATION,
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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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TABLE OF AUTHORITIES

CASES CITED

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1315

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vs.

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Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to Rule 24(4) of the Rules of the Supreme Court of the United States, petitioners James F. Lawrence, et al., interpose this reply brief addressed to two arguments first raised in the briefs in opposition, to wit: (1) the argument that this petition was filed too late; and (2) the argument

that the petitioners have raised a question concerning the professional expertise of counsel who represented respondents Samuel Lindenbaum, 72nd Street Associates and David Berg in the proceedings below.

ARGUMENT

POINT I

THE PETITION FOR CERTIORARI HAS BEEN DULY FILED.

The brief in opposition interposed by respondents Samuel Lindenbaum, et al., filed too late, in that,

> "The order of dismissal of September 13, 1977 was the final determination by the State's highest court on the federal constitutional question presented, and was not subject to further review in the state courts."(p.3)

The principal case cited in support of that proposition is Cox Broadcasting v. Cohn, 420 U.S. 469, 481-5 (1975). In Cox Broadcasting Corp. v. Cohn, supra, this Court referred to Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945), for the rule that the determination of what is a "[f]inal judgment of decree" within the meaning of that language in Title 28, of the United States Code, 28 U.S.C. § 1257,

"had not been administered in such a mechanical fashion and that there were circumstances in which there has been 'a departure from this requirement of finality for federal appellate jurisdiction.'" Cox Broadcasting Corp. v. Cohen, supra at 477.

In Cox, this Court went on to state that:

"These circumstances were said to be 'very few,' ibid.; but as the cases have unfolded, the Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state court to come." Id. (emphasis supplied).

In this action there were "further proceedings...to come" in the highest state court. Those further proceedings were the proceedings on petitioners' motion to it for leave to appeal to that court, preceded by a similar motion in the Appellate Division, First Department. Had petitioners filed their petition for certiorari before the making of and determination on the applications for leave to appeal to the Court of Appeals, the review which they would have been seeking would not have been a review of the final action of the highest state court. This Court might have been required to act on the petition to it for certiorari at the same time that the highest court of New York State might have been reviewing the judgment of the Appellate Division. There were "further

proceedings in the [highest] State court to come." Cox Broadcasting Corp. v. Cohen, supra at 477.

Indeed, had petitioners filed their petition for certiorari in this Court without exhausting their rights to secure review in the highest court of New York State, respondents herein could have, and no doubt would have, argued that the petition was improperly filed, and if by the time that this Court rendered such ruling the time had passed to seek further review in the highest state court, petitioners would have been out of both courts.

The rights of petitioners to move in the Appellate Division and in the Court of Appeals for leave to appeal to the Court of Appeals, and the power of the Appellate Division and the Court of Appeals to act on such applications did not constitute "a latent power in the [Court of Appeals] to reopen or revise its judgment." Market St. Ry. Co. v. Railroad Commission, 324 U.S. 548, 551 (1945). The petitioners herein had the right to seek reversal of the judgment they seek review of in this Court by further proceedings in the highest state court.

Respondents Lindenbaum, et al., to buttress their argument, made without authority, concerning the timeliness of the filing of the petition herein, charge petitioners with disingenuousness in not annexing to their petition a copy of the order of the Court of Appeals dismissing the petitioners' appeal to the Court of Appeals taken as of right, and in stating that that Court rendered "no opinion" (p.2).

Petitioners' statement was absolutely correct. The Court of Appeals rendered no opinion and, because it rendered no opinion, petitioners specifically pointed out to this Court, at page 10 of their petition, the ground of the motion by respondents Lindenbaum, et al., to dismiss the appeal to the Court of Appeals taken as of right.

POINT II

NO ISSUE HAS BEEN RAISED CONCERNING "THE PROFESSIONAL EXPERTISE OF COUNSEL" (P. 16, LINDENBAUM BRIEF IN OPPOSITION) FOR RESPONDENTS.

Respondents Lindenbaum, et al., raise the subject of "the professional expertise of counsel," meaning Mr. Lindenbaum, before the Board of Standards and Appeals. The charge is made that petitioners raised that question by not setting forth in their petition the whole of a paragraphs of the Citizens Union study (p.16) The portion omitted is that portion in which the Citizens Union stated that the fact that Mr. Lindenbaum, and another attorney handling matters in Brooklyn, seldom lose a case "can partially be explained by several factors including the professional expertise of the said attorneys."

Petitioners verily believe that nothing in their petition can be deemed "to give an unfavorable, if not sinister case, derogatory of respondent Lindenbaum's experience and expertise n this field." To obviate any further question, however, concerning the Citizens Union study and

what it says and means, there is appended to this reply brief the text of the whole section of that study from which the quotes have been taken.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Of Counsel

APPENDIX "A"

CITIZENS UNION RESEARCH FOUNDATION, INC.
OF THE CITY OF NEW YORK

15 PARK ROW, NEW YORK, N.Y. 10038 (212)227-0342

THE BOARD OF STANDARDS AND APPEALS:

AN ANALYSIS OF THE DECISION-MAKING PROCESS

by

Nancy E. Haycock

OCCASIONAL PAPER SERIES

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1. The Applicants

More than half of the Manhattan applicants were professional developers or realtors. In Brooklyn, the largest group of applicants were businesses:

STATUS OF THE APPLICANT BY BOROUGH

STATUS	MANHATTAN		BROOKLYN	
	#	%	#	%
Professional developer or realtor	43	55.1	15	16.9
Individual	4	5.1	14	15.7
Business	20	25.6	39	43.8
Non-profit organization	10	12.9	21	23.6
Other	1	1.3	0	0

This concentration may reflect the high cost of obtaining a variance. A bulk variance may cost anywhere from $2000 to $6000. A change of use variance will often cost as much as $10,000.

Of the 168 cases that came before the Board, the applicants were represented most often by an attorney or an architect.

TYPE OF REPRESENTATION	NUMBER	PERCENT
Attorney	71	42.3*
Architect	69	41.1
Engineer	16	9.5
Other	9	5.4

In many cases it is essential for an applicant to have the most qualified representation he can afford. If a representative cannot answer a question during a hearing, Commissioner Klein, (Chairman of the Board) will admonish him to bring an architect

* Attorneys actually appeared in more than 100 cases, but they were the primary representatives in 71 cases.

or an engineer, and he will re-schedule the hearing.

Attorney representation was further broken down to those firms which appeared most often.

ATTORNEY	NUMBER	PERCENT
Lindenbaum	28	16.7
Rothkrug	24	14.3
Salvati	9	5.4

Samuel Lindenbaum was involved only in Manhattan cases, 89% of the time as a representative of a professional developer. He was the attorney in 76% of the cases involving buildings of more than 16 stories.[14] In Brooklyn, Leonard Rothkrug was the most frequent representative; 60% of all of his cases were businessmen. It is worth noting that seldom did either of these attorneys lose a case. This can be partially explained. Both these attorneys make effective presentations; they are well-prepared with persuasive legal, policy and planning arguments. Another factor is that these attorneys can be very selective in their choice of clients. Most attorneys are paid on a contingent fee basis and so they will not accept a case unless there is a good chance of success. This is not a full explanation, but clearly these attorneys have a good idea of what sways the Board.

14. Samuel Lindenbaum is the preferred attorney of large developers such as Samuel Lefrak and Paul and Seymour Milstein.